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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GUSTAVO M., Defendant and Appellant.	A145499 (Alameda County Super. Ct. No. CH51229A)

Defendant Gustavo M. was convicted of first degree murder, shooting at a vehicle, and assault with a firearm, with firearm enhancements. He was 15 years old at the time of the crimes. In his original briefs on appeal, he contended that his confession should not have been admitted, that the trial court committed instructional error, that the evidence was insufficient to show he acted with malice, that the prosecutor engaged in misconduct, that his sentence of 50 years to life constituted cruel and unusual punishment, that he was entitled to a transfer hearing on whether the matter should have proceeded in juvenile court, and that the trial court should consider whether to strike the firearm enhancement.

In this court's original opinion, filed August 29, 2018, a different panel of this division[1] rejected defendant's challenges to the validity of his convictions, but concluded

[1] The author of the original opinion was Schulman, J. (Judge of the Superior Court of California, City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution). Streeter, Acting P. J. and Reardon, J. concurred in the opinion.

he was retroactively entitled to a transfer hearing in the juvenile court because his case was not yet final on appeal. The court also ordered that, if the juvenile court concluded the matter should be transferred to a court of criminal jurisdiction, defendant's convictions should be reinstated, and the trial court should afford defendant the opportunity to make a record of information that would be relevant at a future youth offender parole hearing and should consider whether to exercise its discretion to strike the Penal Code,[2] section 12022.53 enhancement.

Subsequently, the Governor signed Senate Bill No. 1391 (2017–2018 Reg. Sess.), which went into effect January 1, 2019. As amended by this bill, Welfare and Institutions Code section 707, subdivision (a) no longer allows minors who are younger than 16 at the time of an offense to be tried in adult criminal court, except in circumstances not at issue here. The California Supreme Court granted defendant's petition for review and transferred the matter to this court with directions to vacate our original decision and reconsider the case in light of Senate Bill No. 1391. The parties have submitted supplemental briefing on this issue.

In this opinion, we repeat nearly verbatim and adopt sections I and II.A through II.D of the August 29, 2018 decision, which set forth the facts of the case and rejected defendant's contentions regarding the admissibility of his confession, instructional error, the sufficiency of the evidence of premeditation, and prosecutorial misconduct. We shall then deem his convictions to be juvenile adjudications and remand the matter to the juvenile court for further proceedings. [The quoted portion of the August 29, 2018 opinion begins here.]

I. BACKGROUND

A. The Killing

On the evening of February 13, 2010, 15-year-old Samantha P. (Samantha) and her boyfriend, Jesus Diaz, drove to an area in San Lorenzo known as the "duck pond." Diaz told Samantha he had arranged to buy 600 Ecstasy pills from someone named

[2] All undesignated statutory references are to the Penal Code.

Carlos. Another car pulled up, and Carlos approached Diaz's car and said something about money. Samantha recognized Carlos from high school.[3] Two people, wearing black hoodies, ran toward them and demanded money from Diaz. One of them had a gun in his hand. Diaz said he did not have any money, and one of the people in hoodies started hitting him. Diaz started the engine of his vehicle and started to drive away.

Samantha heard gunshots, and a window of the vehicle shattered. Diaz said he had been shot. Samantha called 911 and tried to give the dispatcher their location. Diaz's head slumped onto the steering wheel, and the car accelerated rapidly before crashing, lodged between another car and a house, so that the car doors would not open. Samantha saw that Diaz had a bullet wound in his lower back; he was not moving or breathing. A stranger came and called for the police.

Diaz was struck by a bullet and died of his injuries. Samantha suffered minor injuries.

B. Carlos E.'s Testimony

Carlos testified that defendant was the person who wielded and fired the gun. He, defendant, and two other people, Hector G. and Sergio O., were involved in the incident. Carlos and Hector were 14 years old, and Sergio was 17 years old. Before the incident, Carlos told Diaz he was selling some Ecstasy pills, and Diaz asked how much they would cost. Carlos intended to rob Diaz. He suggested doing so to Sergio; Sergio agreed to the plan, and they decided to ask Hector to participate, because he had a gun. They invited Hector to join them in the robbery and asked to borrow his gun, suggesting Sergio hold the gun to Diaz's head during the robbery. Hector said he was at a mall with defendant and that he would bring defendant along to participate in the robbery. They discussed how they would divide the money they obtained. Sergio and Carlos picked Hector and defendant up in Sergio's car. Defendant sat in the back seat of the car, and when Carlos looked around, he saw defendant had a gun in his hand. Hector said the gun had only four bullets.

[3] Samantha later identified him as Carlos E.

The four made their plan for the robbery: Sergio would wait for the others so they could drive away; Carlos would act as a distraction; Hector and defendant would approach; Hector would pull Diaz out or try to take his money; and defendant would have the gun. Carlos would act as if he was being robbed as well. The group drove toward the duck pond, and Sergio parked nearby. Carlos went up to the car in which Diaz and Samantha were sitting. He recognized Samantha from school. Hector and defendant ran up to the car, with their hoods on. Defendant was holding a gun, aiming it at Diaz. Hector and defendant screamed at Diaz to get out of the car and give them his money. Diaz tried to start his car, and defendant started hitting him with the gun. The car sped off, and Carlos heard the gun being fired. Defendant stepped forward and fired the gun four times toward the car. The back window of the car broke. The group returned to Sergio's house, and defendant suggested hiding the gun in Carlos's house or back yard.

C. Defendant's Statements to Detectives

Defendant was arrested about 8:20 p.m. on the evening of February 15, 2010, and brought to the sheriff's station shortly thereafter. After defendant was arrested, he spoke with two sheriff's detectives, Joshua Armijo and Patrick Smyth. By that time, Hector, Carlos, Sergio, and Samantha had already been interviewed. Hector, Carlos, and Sergio had identified defendant as the shooter.

Defendant's interview began about 12:25 a.m. the following morning; by that time, he had been in a holding cell for about three and a half hours. The interview lasted more than three hours. During that time, defendant was offered a soda, water, and snacks, and he had the opportunity to take rest breaks.

The interview began with small talk about defendant's family, schooling, and activities. Armijo informed defendant of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436), and defendant said he understood them and was willing to talk with the detectives. Defendant originally said he had been at a party the night of the killing. Armijo told defendant he knew defendant had been with other people on the evening in question. Smyth told defendant that they knew the answers to some of the questions they were asking, that they would need to write a report after talking with him, and that they

did not want to say he had lied to them. He told defendant that 15-year-olds sometimes made mistakes and that "some things happened that didn't intend to happen." When the detectives challenged defendant and told him to give his side of the story, defendant told the detectives he was "there" with Hector and Carlos, that he knew they were going to set someone up, that he did not know about the gun, and that someone else did the shooting. He then said that Carlos hit Diaz with his fist or the gun, that defendant told Carlos not to shoot, and that Hector or Carlos shot at the fleeing car.

Armijo again challenged the truthfulness of defendant's version of events, telling him that the other people he had spoken to said Carlos did not have the gun and that the detectives knew defendant had the gun. Defendant said, "I'm the one who shot it." He said he was mad because they were "gonna come up empty handed." He also said he was afraid the victim would be able to identify them because Carlos's face was not obscured by a hood. He said he had bought the gun from "two black guys" in Oakland less than a year previously. Hector had been holding the gun on the day in question.

Defendant then explained that Carlos had suggested "set[ting] up" Diaz with an offer of 600 Ecstasy pills and robbing him. The group planned for Carlos to approach Diaz's car and have Diaz get out of the car for the purported drug deal, before Hector and defendant approached; as it turned out, however, Diaz did not leave the car. Hector and defendant came to the car, and either Hector or Carlos started hitting Diaz, while defendant held the gun, pointed toward the car, to intimidate Diaz. They told Diaz to get out of the car "with his stuff." Diaz drove off, and defendant fired four shots. He was angry because Diaz had not given them anything, and frightened because Diaz had said he recognized Carlos. He said that he did not mean to kill Diaz and that he was not aiming. Defendant saw one of the shots hit the back window of Diaz's car. The group went to Sergio's house and threw the gun into some bushes. The next day, defendant threw the gun into the bay.

D. Verdict and Sentencing

The jury found defendant guilty of first degree murder (Pen. Code, § 187, subd. (a)), shooting at an occupied motor vehicle (§ 246), and assault with a firearm

(§ 245, subd. (a)(2)), and found true allegations that he personally used and discharged a firearm and caused great bodily injury and death to Diaz. The trial court sentenced him to a term of 25 years to life for murder (§ 190, subd. (a)) and a consecutive 25 years to life for one of the firearm enhancements (§ 12022.53, subd. (d)), and stayed sentence on the remaining counts (§ 654), for a total term of 50 years to life.

II. DISCUSSION

A. Admissibility of Defendant's Statement to Investigators

Before trial, the court held a hearing on the admissibility of defendant's pretrial statements to the detectives. Detective Armijo testified that he had received training on how to interview a suspect during an investigation. He had received 80 hours of training during a course with the Institute of Criminal Investigations; had received an additional 40 hours of training in robbery investigations and 40 hours in murder investigations, which included custodial interviews; and had taken another 40-hour course on interviews and interrogations. He had heard of the "Reid method" of interrogation, but he had never attended a course teaching the technique and did not know what it was.

Armijo testified that he was the lead investigator in the case. Before defendant was interviewed, investigators had interviewed Hector, Sergio, and Carlos. Armijo testified that both Hector and Carlos said defendant was the gunman on the night of the killing, and that all three had given nearly identical accounts of the events.

Defendant was held in a holding cell measuring approximately eight-by-ten feet for about three and a half hours before he was interviewed. The cell had a sink, a drinking fountain, a rest room, and a place to sit and lie down.

Defendant was brought into the interview room at 12:26 a.m., and the interview began shortly thereafter. Armijo and Smyth were wearing plain clothes, and they did not carry any weapons. Defendant was not handcuffed. His manner was "[p]olite, calm, talkative, [and] receptive." The interview lasted a little over three hours. During that time, defendant was offered snacks and drinks.

Defendant contends that his statements were not voluntary and that their admission violated his privilege against self-incrimination and his right to due process.

" 'The admissibility of a confession depends upon the totality of the circumstances existing at the time the confession was obtained. [Citations.] A minor can effectively waive his constitutional rights [citation] but age, intelligence, education and ability to comprehend the meaning and effect of his confession are factors in that totality of circumstances to be weighed along with other circumstances in determining whether the confession was a product of free will and an intelligent waiver of the minor's Fifth Amendment rights [citation].' [Citation.] [¶] The federal and state Constitutions both require the prosecution to show the voluntariness of a confession by a preponderance of the evidence. [Citations.] Voluntariness turns on *all* the surrounding circumstances, 'both the characteristics of the accused and the details of the interrogation' [citation]; it does not depend on whether the confession is trustworthy. [Citation.] While a determination that a confession was involuntary requires a finding of coercive police conduct [citations], ' " 'the exertion of any improper influence' " ' by the police suffices [citation]." (*In re Elias V.* (2015) 237 Cal.App.4th 568, 576–577 (*Elias V.*).) " '[W]here a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law.' [Citation.]" (*People v. Perez* (2016) 243 Cal.App.4th 863, 871 (*Perez*).)

Whether a confession is voluntary presents " 'a mixed question of law and fact that is nevertheless predominantly legal . . . .' [Citation.] Hence ' "[o]n appeal, the determination of a trial court as to the ultimate issue of the voluntariness of a confession is reviewed independently . . . . [¶] The trial court's determinations concerning whether coercive police activity was present, whether certain conduct constituted a promise and, if so, whether it operated as an inducement, are apparently subject to independent review as well. [Citation.] However, "the trial court's findings as to the circumstances surrounding the confession—including 'the characteristics of the accused and the details of the interrogation' [citation]—are clearly subject to review for substantial evidence. . . ." ' [Citation.]" (*People v. Jones* (1998) 17 Cal.4th 279, 296.) Where, as here, a defendant's

statement is recorded, we review the voluntariness of the confession de novo. (*Perez, supra,* 243 Cal.App.4th at p. 871.)

Defendant relies primarily on *Elias V.*, decided by our colleagues in Division Two of the First District Court of Appeal, for his argument that his confession was involuntary. It is worthwhile to discuss *Elias V.* in detail. The minor there, Elias, who was 13 years old, was alleged to have committed a lewd act on a child. (*Elias V., supra,* 237 Cal.App.4th at p. 570.) A detective and two deputy sheriffs went to Elias's elementary school to speak with him, and the principal brought him to a small office. (*Id.* at p. 574.) During the interrogation, the detective stated as a fact that Elias had touched the victim in a sexual manner; she first suggested he had done so because he found it exciting. . . . Elias rejected that suggestion; when the detective said, "But you did it," he accepted her [alternate] suggestion that he had done so out of curiosity. (*Id.* at pp. 574–575, 585–586.) He went on to describe touching the victim inappropriately for a few seconds. (*Id.* at p. 586.)

The juvenile court denied Elias's motion to exclude his statements and declared him a ward of the court. (*Elias V., supra,* 237 Cal.App.4th at p. 570.) The appellate court reversed. It began by addressing concerns about false confessions, particularly when juveniles are questioned. "Since *Miranda,* the Supreme Court has continued to express concerns about false confessions. In *Corley v. United States* (2009) 556 U.S. 303, 320–321, the court observed again that ' "[c]ustodial police interrogation, by its very nature, isolates and pressures the individual," [citation], and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed . . . .' (*Ibid.*) Even more recently, the court indicated that its long-standing concern about false confessions may be most acute in cases involving the police interrogation of juveniles, particularly adolescents. [Citation.] An extensive body of literature demonstrates that juveniles are 'more suggestible than adults, may easily be influenced by questioning from authority figures, and may provide inaccurate reports when questioned in a leading, repeated, and suggestive fashion' [citations], and that 'juveniles aged fifteen and younger have deficits

in their legal understanding, knowledge, and decision-making capabilities.' " (*Elias V., supra*, 237 Cal.App.4th at p. 578.)

The court went on to describe the "The Reid Technique," a commonly used interrogation method. (*Elias V., supra*, 237 Cal.App.4th at p. 579.) " 'First, investigators are advised to isolate the suspect in a small private room, which increases his or her anxiety and incentive to escape. A nine-step process then ensues in which an interrogator employs both negative and positive incentives. On one hand, the interrogator confronts the suspect with accusations of guilt, assertions that may be bolstered by evidence, real or manufactured, and refuses to accept alibis and denials. On the other hand, the interrogator offers sympathy and moral justification, introducing "themes" that minimize the crime and lead suspects to see confession as an expedient means of escape.' [Citation.]" (*Id*. at pp. 579–580.) This interrogation should be conducted only "*after* investigation points to the suspect's likely guilt." (*Id*. at p. 580.)

The court also noted that police may facilitate false confessions by disclosing specific facts about the crime and inducing the suspect to adopt those facts, a technique that "has been found to be coercive and to have overcome the will of subjects, particularly those who are young and otherwise vulnerable," and that " 'prevents police from testing and corroborating the reliability of the admissions and confessions they elicit.' " (*Elias V., supra*, 237 Cal.App.4th at p. 592.)

The court also relied upon the young age of the offender in *Elias V.*, noting that a "growing number of studies show[] that the risk interrogation will produce a false confession is significantly greater for juveniles than for adults; indeed, juveniles usually account for one-third of proven false confession cases." (*Elias V., supra*, 237 Cal.App.4th at p. 588.)[4]

[4] Long ago, the United States Supreme Court noted that "[a]ge 15 is a tender and difficult age for a boy," who "cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the night by relays of police, is a ready victim of inquisition." (*Haley v. Ohio* (1948) 332 U.S. 596, 599.)

On the facts of the case before it, the court found the interrogation of Elias, using the Reid Technique, rendered his statements involuntary. The detective repeatedly referred to Elias's guilt as an established fact and showed interest only in confirming details. (*Elias V.*, *supra*, 237 Cal.App.4th at p. 582.) In doing so, she used deceptive tactics, including the use of false evidence, telling Elias falsely that the victim had " 'explained it perfectly' " and that another witness had walked in and seen the lewd conduct. (*Id*. at p. 583.) She suggested scenarios involving improper touching, increasing the likelihood that Elias's statements were the result of his suggestibility, rather than his recall of events, and she had no independent information about the alleged offense to act as a basis to evaluate the truth of his statements. (*Id*. at p. 593.) She threatened to subject him against his will to a lie detector test that would reveal the falsity of his denials. (*Id*. at p. 584.) She used "minimization" techniques to provide him with a face-saving excuse for having committed the acts, that is, the more acceptable alternative that he was curious rather than excited. (*Id*. at pp. 583, 584–586.) The court went on: "By offering Elias alternative explanations for improperly touching [the victim]—because he 'found it exciting' or 'out of curiosity'—[the detective] employed a so-called 'false choice' strategy. As stated in the Reid text, '[w]hen the investigator presents the alternative question to the suspect, it is not enough simply to ask the question and then wait for the suspect to answer. The investigator must encourage the suspect to select one of the two options. This is accomplished through the use of positive and negative "supporting statements." [¶] . . . The investigator should state that if the positive alternative is true, it is something he can understand.' [Citation.]" (*Id*. at p. 586.) Based on a combination of Elias's youth, the absence of any evidence corroborating his inculpatory statements, and the likelihood that the detective's use of deception and overbearing tactics would induce involuntary and untrustworthy incriminating admissions, the appellate court concluded the statements were involuntary. (*Id*. at pp. 586–587.)[5]

[5] See also *In re T.F*. (2017) 16 Cal.App.5th 202, 213–221 (*T.F*.) [following *Elias*

Elias V. did not hold that all confessions of juveniles are involuntary, nor did it alter the controlling totality of the circumstances test that governs review of the voluntariness of a confession by a suspect, whether an adult or a minor. (See *In re Joseph H.* (2015) 237 Cal.App.4th 517, 534 ["it cannot be said that a juvenile cannot waive constitutional rights as a matter of law"]; *Elias V., supra,* 237 Cal.App.4th at p. 576.) Nor, contrary to defendant's position, does it hold that *any* use by police investigators of the so-called Reid Technique or similar interrogation approaches with juveniles automatically renders any resulting confession coerced and involuntary. Rather, the appellate court's holding was expressly based on a combination of three factors turning on the facts of that case: "(1) Elias's youth . . . ; (2) the absence of any evidence corroborating Elias's inculpatory statements; and (3) the likelihood that [the police investigator's] use of deception and overbearing tactics would induce involuntary and untrustworthy incriminating statements." (*Elias V., supra,* 237 Cal.App.4th at pp. 586–587.) The court distinguished *In re Joe R.* (1980) 27 Cal.3d 496, in which our high court upheld the trial court's determination that a minor's confession to robbery was voluntary, noting that it "involved a minor significantly older than Elias, the interrogator did not use false evidence, false choice questions or other forms of deception, and the interrogation was preceded by an investigation that independently provided substantial inculpatory and corroborating evidence." (*Elias V., supra,* at p. 595.)

In our view, the combination of factors involved in *Elias V.* is not present here, and the trial court therefore did not err in concluding that the People proved by a

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V., holding that minor's confession to having committed a lewd act was involuntary where minor had a documented intellectual disability; "had been interrogated in a small room at his school by two armed officers" (*id.* at p. 221) for nearly an hour without being given a *Miranda* warning, during which he denied any lewd conduct "at least 23 times" (*id.* at p. 208, fn. 8), was "very emotional" (*id.* at p. 209), "sobbed uncontrollably" (*id.* at p. 221), and ultimately confessed; at which point he was handcuffed, placed under arrest, given a "rapid recitation" (*id.* at p. 209) of the *Miranda* warning during which officers did not take the time to determine whether he understood all of his rights; and was then subjected to another "accusatory interrogation" at the police station that was "dominating, unyielding, and intimidating" (*id.* at p. 218)].)

preponderance of the evidence that defendant's confession was voluntary and not coerced.

First, while defendant also was an adolescent, at 15 years old, he was not as young as Elias, and he had been arrested previously and charged with felony burglary.[6] In contrast, Elias was 13 years of age, "a young adolescent, there is no indication in the record he was particularly sophisticated, and he had no prior confrontations with the police." (*Elias V.*, *supra*, 237 Cal.App.4th at p. 591; see also *id.* at p. 593 ["the use of deceptive techniques is significantly more indicative of involuntariness where, as here, the subject is a 13-year-old adolescent who has never previously had any confrontation with the police"].) Indeed, his degree of immaturity can be gauged from the fact that in response to questions regarding his alleged sexual touching of a young child, he described female genitalia as "nasty," "disgusting," and "kinda gross." (*Id.* at pp. 585–586.) Defendant, in contrast, was armed with a loaded semiautomatic handgun that he had purchased around one year earlier, and readily agreed to take part in a robbery involving a staged drug deal. While age doubtless is "a factor in determining the voluntariness of a confession," a minor—even a minor considerably younger than defendant—is capable of making a voluntary confession. (See *In re Joseph H.*, *supra*, 237 Cal.App.4th at pp. 533–535 [no evidence of coercive police activity to support finding that 10-year-old with ADHD and low-average intelligence who confessed to shooting his father did so involuntarily].)

Second, in stark contrast to *Elias V.*, there was a great deal of evidence that strongly pointed to defendant's guilt of the crime and corroborated defendant's confession. In *Elias V.*, the only evidence that Elias touched the child in an improper manner was the mother's statement that the child told her he did so and the detective's testimony that the child said he "touched her" and, in the detective's opinion, pointed to the vaginal area on a doll. (*Elias V.*, *supra*, 237 Cal.App.4th at p. 591.) The mother

[6] Notably, that arrest occurred on February 8, 2010, just days before the robbery and murder involved here. The burglary charge was dismissed in September 2013 due to the pending, more serious murder case.

never testified that she saw Elias improperly touch her child (*id.* at p. 571), nor was there any evidence that anyone other than the mother heard the things she claimed her daughter had been " 'telling everybody.' " (*Id.* at p. 591.) "The sole evidence of the manner in which Elias allegedly touched the child came from Elias's interrogation, and no evidence corroborated his incriminating statements." (*Ibid.*) Although the child's interview was recorded, the recording was never offered in evidence and the interviewer did not testify. (*Id.* at p. 571.) Further, the mother had delayed contacting the police for 17 days, and there was reason to question whether she had concocted the charge because she had just learned that the landlord intended to evict her family and falsely believed Elias's father was behind the eviction, a subject on which she gave "inconsistent and confusing" testimony. (*Id.* at p. 572.) Thus, particularly given the tender age (three) of the child involved, it was not even clear that *any* crime had been committed. (See *id.* at p. 596 [noting "the absence of any evidence corroborating the truth of Elias's incriminating statements . . . and the presence of evidence suggesting they may be false"].)

Here, in contrast, there was no doubt there had been an armed robbery resulting in the shooting and death of a teenager. Moreover, by the time detectives questioned defendant, three of the other participants—Hector, Carlos, and Sergio—had identified defendant as having participated in the robbery, and as having been the shooter. While defendant contends those accomplices had a motive to lie, all three were consistent in having independently identified him. Thus, it is inescapable that (again, unlike in *Elias V.*) the investigation had uncovered very substantial evidence pointing to defendant's likely guilt. As the *Elias V.* court acknowledged, "Corroboration is '[t]he ultimate test of the trustworthiness of a confession.' " (*Elias V., supra,* 237 Cal.App.4th at pp. 591–592.)

Third, again in sharp contrast to *Elias V.*, the detectives did not use deceptive or overbearing tactics likely to induce involuntary and untrustworthy incriminating admissions. In *Elias V.*, the detectives utilized a range of such techniques, subjecting the 13-year-old to an "accusatory interrogation" that was "dominating, unyielding, and intimidating" and that included "relentless" repeated questions insinuating guilt (*Elias V., supra,* 237 Cal.App.4th at pp. 582–583, 586); the use of "false evidence" comprising

false representations as to what witnesses had witnessed (*id.* at pp. 583–584); threatening to subject Elias against his will to a lie detector test that would definitively reveal the falsity of his denials (*id.* at p. 584); suggesting multiple scenarios involving improper touching, thereby enhancing the likelihood that Elias's statements resulted from his suggestibility rather than recall of actual events (*id.* at p. 593); and employing a so-called "false choice" strategy by offering Elias alternative explanations for improperly touching the child victim, either of which would incriminate him. (*Id.* at p. 586.)[7]

Here, the detectives did not employ such deceptive tactics. It is true that the detectives were adamant in insisting they knew defendant was present at the crime scene and that he had shot the gun, and that they offered defendant the face-saving possibility that he had not intended to kill Diaz. However, they did not use deceptive techniques: their insistence on defendant's culpability was based on their conversations with other witnesses who had identified defendant as the gunman, and the facts of the case were easily susceptible to an interpretation that the defendant did not plan to kill Diaz when the incident began. That the detectives "engaged in a back-and-forth conversation during which the detectives expressed their belief that [defendant] was the shooter and [defendant] consistently denied that allegation" does not render the interrogation coercive. (*People v. Jones* (2017) 7 Cal.App.5th 787, 812 (*Jones*).) Further, as our high court concluded in *People v. Carrington* (2009) 47 Cal.4th 145, 171, suggestions that a homicide "might have been an accident, a self-defensive reaction, or the product of fear, were not coercive; they merely suggested possible explanations of the events and offered defendant an opportunity to provide details of the crime. This tactic is permissible." Moreover, although the detectives told defendant they knew he had the gun, they did not suggest specific details that defendant merely adopted; rather, he recalled events independently. Indeed, although the detectives told defendant that they had spoken with

[7] Two of these three points of distinction (lack of experience with police confrontation and relatively weak corroborative evidence) distinguish this case from *T.F.* as well. While is true that deception was present in *T.F.*, that case involved a lengthy pre-*Miranda* interrogation at which much of the overbearing police conduct took place.

others, they repeatedly declined defendant's requests to give him any information about what they had learned regarding the incident.[8]

Defendant contends that detectives utilized "false evidence" by referring to unidentified eyewitnesses who "say that Carlos didn't have the gun." But that was an accurate characterization of what defendant's three accomplices had already told the police. Just as in *Jones*, "the detectives clearly believed that [defendant] was the shooter, and the various ruses they employed were aimed at eliciting his admission that he was the one who fired the gun." (*Jones, supra*, 7 Cal.App.5th at p. 814.) Even if the detectives did falsely imply there were other eyewitnesses to the crime who could identify defendant (or rule out Carlos) as the shooter, " 'the use of deceptive comments does not necessarily render a statement involuntary. Deception does not undermine the voluntariness of a defendant's statements to the authorities unless the deception is " ' "of a type reasonably likely to procure an untrue statement." ' " [Citations.] " 'The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' " ' " (*Jones, supra*, 7 Cal.App.5th at pp. 814–815 [detective's deceptive statements about the nature of the evidence that the police had linking the minor defendant and his father to the shootings did not constitute coercive police tactics that overcame his will and rendered his statement involuntary].)

Nor did detectives make any express or implied promise of leniency to defendant. Early in the interrogation, one of the detectives told defendant that "people eventually down the line have to make a decision about this thing. About what happens to you and your future. Okay? They're going to look at this story so far of where you were that night . . . . and they're gonna think that you're some kind of cold blooded guy." Later, he said, "the people who gotta make a decision about what happens to your future is not us.

[8] While the detectives asked defendant whether he would be willing to take a lie detector test and what he thought the results of such a test would be, they did not threaten to subject him to such a test against his will. In context, it is clear that their brief isolated reference to such a test was intended to underline the importance of defendant telling the truth.

It's someone else. Um and I know that you're trying to distance yourself from that. Okay. But are you a cold, are you cold blooded? . . . [D]o you have ice water running through your veins?" The detectives also suggested that "[p]eople can understand people admitting their mistakes and moving on" and that it would be good for everybody for defendant "to get it off your chest and get it out there and start moving past it." These statements were not improper. (*Jones, supra,* 7 Cal.App.5th at pp. 812–813 [" ' "mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary" ' "; detective's isolated comment that minor might have to serve "a little time in camp" was not an express promise of leniency and did not proximately cause minor's statements].) "Absent improper threats or promises, law enforcement officers are permitted to urge that it would be better to tell the truth." (*People v. Williams* (2010) 49 Cal.4th 405, 444.)

Given the totality of the circumstances, the trial court did not err in admitting defendant's statements.[9]

B. CALCRIM No. 548

Defendant contends the trial court misstated the law when it instructed the jurors that they did not all need to agree on the same theory of murder, because this suggested the jurors did not need to agree unanimously on the *degree* of murder. In the challenged instruction, CALCRIM No. 548, the court instructed the jury: "The defendant has been prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder. [¶] Each theory of murder has different requirements, and I will instruct you on both. [¶] You may not find the defendant guilty of murder unless all of you agree that the

[9] Amicus curiae Pacific Juvenile Defender Center (PJDC) has filed a brief, which we have considered. PJDC argues, inter alia, that defendant's waiver of his *Miranda* rights was not voluntary. Because defendant did not raise this issue as a ground for reversal, we do not address it. (See *Berg v. Traylor* (2007) 148 Cal.App.4th 809, 823, fn. 5 [" ' " 'Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered [citations].' " ' "].)

People have proved that the defendant committed murder under at least one of these theories. You do not all need to agree on the same theory."

Defendant points out that he was prosecuted not only for first degree murder, under theories of both felony murder and premeditated murder with malice aforethought, but also for second degree murder with malice aforethought. The challenged instruction, he argues, erroneously suggested that the jurors need not reach a unanimous verdict on the degree of murder of which he was guilty. We reject this contention because the instructions as a whole required unanimity on the degree of murder.

A jury verdict must be unanimous as to the degree of murder; however, where a defendant is prosecuted for first degree murder, " ' "it is not necessary that all jurors agree on one or more of several theories proposed by the prosecution; it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of first degree murder as that offense is defined by statute." [Citation.]' [Citations.]" (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1024–1025 (*Sanchez*); see also *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1278 (*Johnson*); *People v. Moore* (2011) 51 Cal.4th 386, 413.) Murder is defined by statute as the unlawful killing of a human being or a fetus "with malice aforethought." (§ 187, subd. (a).) First degree murder includes murder perpetrated "by . . . willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, . . . robbery . . . ." (§ 189.) Under this rule, the jury did not need to be unanimous as whether to defendant killed Diaz willfully, with deliberation and premeditation (the "malice aforethought" theory) or during the commission of the robbery (the "felony murder" theory), as long as it agreed unanimously that the killing constituted first degree murder.

" 'A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]' [Citation.] 'We credit jurors with intelligence and common sense [citation] and we do not assume that these virtues will abandon them when presented with a court's instructions. [Citations.]' [Citation.] ' "[T]he correctness of jury instructions is to be determined from

the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." ' " (*Sanchez*, *supra*, 221 Cal.App.4th at p. 1024.)

Viewing the instructions as a whole, we see no reasonable likelihood the jury understood that it need not find unanimously that defendant's conduct fell within the definition of first degree murder. The instruction on first or second degree murder informed the jury, "If you decide that the defendant committed murder, it is murder of the second degree, *unless the People have proved beyond a reasonable doubt that it is murder of the first degree* as defined in CALCRIM No. 521." (Italics added.) CALCRIM No. 521, the instruction on first degree murder, stated, "You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory." The instruction concluded, "The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder." The jury was further instructed, that "*[i]f all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of first degree murder*," the jury should complete and sign that verdict form, and that "[i]f all of you cannot agree whether the defendant is guilty of first degree murder," it should inform the court and not complete or sign any verdict forms for that count. (Italics added.) These instructions informed the jury that it must find unanimously that defendant's crime constituted first degree murder.

Defendant argues the jury's confusion is shown by questions it directed to the court during deliberations. The verdict form for first degree murder stated that the jury found defendant guilty of first degree murder in that "defendant did unlawfully, and with malice aforethought, murder" Diaz. While deliberating, the jury sent the following request: "We would like some clarification on why the verdict sheet has no mention of felony murder on Count 1. [¶] Does felony murder include malice aforethought as dictated on verdict sheet[?]" With the agreement of counsel, the court responded, "Please see instruction 548." Later, the jury sent another request: "Why does the verdict refer to

malice aforethought *specifically* without including the theory of felony murder? We referred to 548 but we would like it clarified explicitly." Before receiving a response to this inquiry, the jury announced it had reached its verdict. These inquiries reflect uncertainty as to whether felony murder fell within the definition of murder with malice aforethought; they do not suggest the jury believed it did not need to find unanimously that defendant's crime was murder in the first degree.

Defendant's reliance on *Sanchez* and *Johnson* does not persuade us otherwise. In *Sanchez*, the court found the use of CALCRIM No. 548 misleading where the defendant was prosecuted on alternate theories of aiding and abetting that supported different degrees of murder, but was tried on only one theory of first degree murder. (*Sanchez*, *supra*, 221 Cal.App.4th at pp. 1024–1025.) Thus, the rule that in a prosecution for first degree murder it is not necessary that the jurors agree on one or more of several theories proposed by the prosecution did not apply "because there was only one theory of first degree murder." (*Id.* at p. 1025.) In those circumstances—"presented with alternate theories of liability which led to different results as to the degree of murder"—the trial court erred in giving the instruction. (*Id*. at pp. 1025–1026.) Similarly, in *Johnson*, "the jury was presented with one theory of first degree murder, namely, first degree felony murder, and one theory of second degree murder, namely, malice murder." (*Johnson*, *supra*, 243 Cal.App.4th at p. 1279.) As applied to that case, the court concluded, CALCRIM No. 548 was an erroneous statement of the law. (*Id*. at pp. 1280–1281.) Here, in contrast, the jury was presented with two theories of first degree murder; it could disagree on which theory applied to the case while finding unanimously that defendant committed first degree murder (as it did in the verdict form).[10]

[10] The final sentence of CALCRIM No. 548 has since been modified to read: "You do not all need to agree on the same theory[, but you must unanimously agree whether the murder is in the first or second degree]." While the bracketed language adds more clarity, the instructions as a whole informed the jury of the need for unanimity on the degree of murder.

Accordingly, we conclude defendant has not met his burden to show there is a reasonable likelihood the jury misunderstood CALCRIM No. 548 to mean it did not have to reach a unanimous verdict as to the degree of defendant's crime.

C. Sufficiency of Evidence

Defendant argues that at least some of the jurors must have relied on the theory that he acted with deliberation and premeditation, rather than on a theory of felony murder, and that there was insufficient evidence of premeditation. We reject this contention.

It is well established that "[a] first degree murder verdict will be upheld if there is sufficient evidence as to at least one of the theories on which the jury is instructed, 'absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground.' [Citation.]" (*People v. Nelson* (2016) 1 Cal.5th 513, 552.) The jury was instructed on theories of both first degree felony murder and first degree malice aforethought murder. Defendant makes no effort to argue the evidence is not sufficient to support a finding that he committed murder during the commission of a robbery.

He argues, however, that the jury's notes—questioning why felony murder was not explicitly mentioned on the first degree murder verdict form—indicates that at least some jurors based their decision not on a theory of felony murder, but on the theory that he acted with premeditation and deliberation.[11] It appears to us a more natural interpretation that the jury was relying on a theory of felony murder and wished to confirm that the verdict form encompassed that theory. On this record, we will not presume that some of the jurors were unpersuaded that defendant killed Diaz during the commission of a robbery.

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[11] As we have noted, murder is defined as an unlawful killing "with malice aforethought" (§ 187, subd. (a)), and first degree murder includes one committed during the commission of specified felonies, including robbery (§ 189). Courts have employed various formulations to express the requirement of malice when a defendant is accused of felony murder, sometimes saying that the law " 'imputes malice' " to one who kills in perpetration of a robbery, and sometimes that the felony murder rule acts as a " 'substitute' for malice aforethought." (*People v. Friend* (2009) 47 Cal.4th 1, 75–76.)

In any case, the evidence of premeditation and deliberation, while not strong, is sufficient to support a finding of first degree murder. We bear in mind that "we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Defendant told the investigators he fired the gun because he was angry that Diaz had not given them anything, and he was frightened because Diaz had said he recognized Carlos. (See *People v. Solomon* (2010) 49 Cal.4th 792, 813 [test for premeditation and deliberation " 'is not the duration of time as much as the extent of the reflection' "].) The jury could reasonably rely on this evidence to conclude defendant deliberately shot at the car in an effort to silence Diaz and Samantha.

D. Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct while questioning a witness and during oral argument.[12] " ' "The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation." [Citation.]' " (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 241, citing *People v. Smithey* (1999) 20 Cal.4th 936, 960.) " 'A prosecutor has a duty to prosecute vigorously. "But, while he may strike hard

[12] Although defendant did not object to all of the statements and questions he now challenges, we will consider his contentions on the merits. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." ' [Citation.]" (*Zambrano*, at p. 241.)

A conviction will not be reversed for prosecutorial misconduct unless it is reasonably probable the jury would have reached a more favorable result in the absence of the misconduct. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Where the challenge is to comments made to the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.)

With these principles in mind, we consider the actions defendant challenges. First, when questioning Carlos, the prosecutor four times either prefaced questions or included within the questions a reference to a "robbery that resulted in the death of a human being."[13] Defendant contends these references were gratuitous and were designed to encourage the jury to accept one of the prosecutor's theories of murder. These references were confined to a brief portion of the prosecutor's examination, and there is no basis to conclude the jury applied them in an objectionable manner or that they prejudiced defendant in his effort to argue that the robbery was already finished when the shooting occurred.

Second, the prosecutor stated during closing argument: "What is the defense going to be in this case? [Defense counsel] is a talented attorney. He's professional.

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[13] The prosecutor prefaced his first question with, "[W]e're going to ask you some questions about a robbery that resulted in the death of a human being." After establishing the date of the crimes, the prosecutor repeated, "I'm going to talk to you about a robbery that resulted in the death of a human being that occurred on that date." Defendant's objections to these two references were overruled. After Carlos testified that he was involved in the robbery and defendant used a gun during the incident, the prosecutor asked, "[W]ere you arrested in the aftermath of that robbery that resulted in the death of a human being?" Later, the prosecutor asked if Hector was "also involved in this robbery that resulted in the death of a human being," and defense counsel again raised an objection. Outside the presence of the jury, defense counsel objected to the prosecutor's repeated references and asked for an admonition or mistrial, and the trial court overruled the objection.

And he's doing all that he can to protect his client and to advocate for his client and you cannot hold that against him at all. He has to get up here. He has to convince you that Carlos is lying, Samantha didn't see what she saw." Defense counsel objected on the ground that defendant had "no obligation to convince them of anything," and the trial court overruled the objection, noting, "This is argument." Defendant contends this argument improperly suggested to the jury that he had the burden of persuasion and deprived him of the presumption of innocence. (See *Taylor v. Kentucky* (1978) 436 U.S. 478, 482 [presumption of innocence and prosecution's burden of proof beyond a reasonable doubt are fundamental principles].) We are unpersuaded. The prosecutor emphasized early in his argument, "I have the burden in this case, and you need to hold me to that burden. If I don't convince you beyond a reasonable doubt that Gustavo [M.] is guilty of murder, then you find him not guilty. That's your job. That's my role." Near the end of his argument—shortly after the statement defendant challenges—he told the jury, "This is a courtroom of law. There are rights that any person seated here is given and deserves. When you do your job in that jury room, you honor the presumption of innocence, you honor the defendant's right not to testify, you honor my burden. But make no mistake, the evidence in this case speaks for itself." Thus, the prosecutor's argument as a whole was unambiguous as to who carried the burden of proof. The jury was correctly instructed on the prosecution's burden of proof.[14] There is no basis to conclude the jury viewed the prosecutor's statement as anything more than commentary on the strength of the evidence of defendant's guilt.

Finally, defendant contends the prosecutor improperly appealed to the jury's sympathies during argument. In his closing argument, he told the jury Diaz had been killed five years previously, and the jury had "the opportunity to finally put an end to this case"; he told the jury Samantha was "still dealing with this because this case has taken almost five years to be resolved by a jury such as the one here today"; and he said the jury was "here today to finally put this case to bed to hold him accountable for the life

[14] "The jurors are presumed to understand, follow, and apply the instructions to the facts of the case before them." (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1229.)

that he took." In his rebuttal, he told the jury that for more than 250 years, "there's been rights and standards of justice that we follow in this country. Rights that protect this man right here to have a fair trial, to not be prejudged by you because of his last name or where he came from, or anything else. Whoever sits in that chair gets the same rights that any of you would get. But I get rights too. The prosecution gets rights. The community gets rights. The victim has rights." He then urged the jury to "finally put an end to a five-year long saga of pain and suffering." Defendant argues these statements amounted to "a systematic effort to inflame the passions of the jury against appellant" in favor of Samantha.

We are not persuaded that these comments were reprehensible or infected the trial with unfairness. The prosecutor did not use inflammatory language, he noted the youth of those involved—including defendant—and he urged the jury not to be swayed by prejudice. Shortly after telling the jury it would be able to "finally put an end to this case," the prosecutor continued, "[T]his case is nothing short of a tragedy. It's something that weighs heavier on the heart. The defendant in this case was 15 years old at the time, 19 years old now. The victim in this case, Jesus Diaz, he was 17 years old and 13 months to the day that the defendant's bullet went through his back. It's a tragic case. It brings no one pleasure sitting where you are and learning about these facts." Immediately after commenting that the prosecution, the community, and the victim had rights, the prosecutor added, "Follow the law, follow the evidence. Don't be swayed by bias or prejudice." His statements do not appear to have been designed impermissibly to inflame the jury's passions, and they did not constitute reversible misconduct. (See, e.g., *People v. Pearson* (2013) 56 Cal.4th 393, 441 [rejecting claim that prosecutor improperly asked jury to sympathize with certain witnesses to charged murders when he summarized their testimony and commented that they were also victims of defendant's massacre].) In any event, given the substantial evidence of defendant's guilt, we find "no reasonable probability that the prosecutor's appeal to the jurors' sympathy for the victim affected the verdict rendered." (*People v. Fields* (1983) 35 Cal.3d 329, 363; see also *People v. Seumanu* (2015) 61 Cal.4th 1293, 1344 [prosecutor's argument improperly asked jury to

view crime through victim's eyes, but was harmless error].) [End of quotation from August 29, 2018 opinion.]

E. Remand to Juvenile Court

At the time defendant was charged and tried, California law permitted a district attorney, for certain offenses, to file a case against a juvenile 14 years of age or older directly in adult court. (Former Welf. & Inst. Code, § 707, subd. (d), repealed by Prop. 57, § 4.2, as approved by voters Gen. Elect. (Nov. 8, 2016), eff. Nov. 9, 2016; *People v. Vela* (2018) 21 Cal.App.5th 1099, 1105 (*Vela*).) Proposition 57 amended this statute to eliminate direct filing by prosecutors and require the juvenile court to conduct a transfer hearing to determine a minor's suitability for juvenile court. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 305–306 (*Lara*), former Welf. & Inst. Code, § 707.) This provision applied retroactively to minors whose judgments were not yet final on appeal. (*Lara*, at pp. 303–304, 309–314.)

Senate Bill No. 1391, effective January 1, 2019, further amended Welfare and Institutions Code section 707 to eliminate the prosecutor's authority to bring a transfer motion in a case involving a minor who was 14 or 15 years old at the time of the offense, unless the minor was not apprehended before the end of juvenile court jurisdiction. (§ 707, subd. (a), as amended (Sen. Bill No. 1391 (2017–2018 Reg. Sess.) § 1).) Defendant argues, and the Attorney General concedes, that Senate Bill No. 1391 is an ameliorative change to the criminal law, which reduces the punishment for crimes, and that it therefore applies retroactively to minors whose judgments are not final on appeal. (See *Lara*, *supra*, 4 Cal.5th at pp. 303–304, 309–314 [because Proposition 57 reduced possible punishment for juveniles, it applied retroactively]; *In re Estrada* (1965) 63 Cal.2d 740.) We agree that defendant is entitled to the benefit of Senate Bill No. 1391 and that this case must proceed under juvenile court law. The matter must therefore be remanded to the juvenile court for appropriate proceedings.

The proper scope of those proceedings is found in *Vela*. The defendant there argued that, because the amendments of Proposition 57 eliminating direct filing applied retroactively, his convictions should be reversed. The court disagreed, stating, "The

jury's convictions, as well as its true findings as to the sentencing enhancements, will remain in place. Nothing is to be gained by having a 'dispositional hearing,' or effectively a second trial, in the juvenile court. [Defendant] has already had a jury trial with all the rights afforded to him in that proceeding; 12 jurors found him guilty beyond a reasonable doubt." (*Vela*, *supra*, 21 Cal.App.5th at p. 1112.) The court therefore ordered that, if the juvenile court retained jurisdiction of the defendant on remand, it should treat his convictions as juvenile adjudications and impose an appropriate disposition. (*Id*. at p. 1113.) Our high court has endorsed this approach (*Lara*, *supra*, 4 Cal.5th at pp. 309–310, 313) and subsequent cases have followed it. (See, e.g., *People v. Garcia* (2018) 30 Cal.App.5th 316, 330; *People v. Phung* (2018) 25 Cal.App.5th 741, 761–763 (*Phung*).) We shall likewise order the juvenile court to treat defendant's convictions and enhancements as juvenile adjudications and impose an appropriate disposition.

Those enhancements include findings that defendant personally and intentionally discharged a firearm and caused great bodily injury and death within the meaning of section 12022.53, subdivision (d), which provides an additional term of 25 years to life. The jury also found true allegations that he used a firearm for purposes of section 12022.5, subdivision (a), which provides for an additional term of three, four, or ten years, and section 12022.53, subdivision (b), which provides for an additional term of ten years.

The Legislature subsequently enacted Senate Bill No. 620, which amended sections 12022.5 and 12022.53 to give trial courts discretion to strike or dismiss these enhancements in the interests of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.) [effective January 1, 2018]; §§ 12022.5, subd. (c), 12022.53, subd. (h).) The Attorney General concedes that these provisions apply retroactively to cases not yet final on appeal. We agree. (See *Vela*, *supra*, 21 Cal.App.5th pp. 1113–1114; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091.) On remand, the juvenile court shall exercise

its discretion pursuant to Senate Bill No. 620 in deciding whether to strike the firearm enhancements. (*Phung, supra*, 25 Cal.App.5th at p. 763.)[15]

III. DISPOSITION

This court's August 29, 2018 decision is vacated. The judgment is reversed. The matter is remanded to the juvenile court, which shall deem defendant's criminal convictions and enhancements to be juvenile adjudications as of the date of the verdict. The juvenile court shall exercise its discretion pursuant to Senate Bill No. 620 in deciding whether to strike the firearm enhancements. The juvenile court shall then impose an appropriate disposition within its usual timeframe.

[15] In light of the foregoing, defendant's contentions relating to the length of his sentence and a future youth offender parole hearing are moot.

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TUCHER, J.

WE CONCUR:

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POLLAK, P. J.

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STREETER, J.